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No. 91-244

In The

Supreme Court of the United States

October Term, 1991

JAMES L. BARNES, JR., LEONARD GREFSENG, ROY R. KIMBERLY, LELLWYN B. LACKEY, WILLIE H. LITTLE, ELLIOTT H. MOORE, LILLIAN NORTHINGTON AND JOSEPH D. PATRICK,

Petitioners,

versus

A.S. LACY, D.C. REYNOLDS, ENERGEN BENEFITS COMMITTEE, ENERGEN CORPORATION, ENERGEN RETIREMENT INCOME PLAN, G.C. KETCHAM, G.C. YOUNGBLOOD, J.A. MARTIN, R.J. PATZKE, W.D. SELF AND ALABAMA GAS CORPORATION,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Court of Appeals correctly ruled as a matter of law that there is no breach of fiduciary duty where a company describes present plan terms to employees truthfully and with no intent to deceive?

II. Whether the Court of Appeals correctly ruled that the Company did not have an obligation to affirmatively tell employees the Company reserved the right to consider future offers of voluntary early retirement, when at the time the Company offered its first plan (VERO) in 1985, it had no intention of making a future similar offer?

III. Whether the Court of Appeals correctly held as a matter of law that plan participants have notice of the Company's reservation of the right to amend the Plan, when an express reservation of that right is contained in the Summary Plan Description provided to plan participants?

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STATEMENT OF THE CASE

A. Statement of Facts[1]

In November of 1985 Alabama Gas Corporation (hereinafter "Alagasco" or the "Company"), a subsidiary of Energen Corporation[2] announced the formation of a voluntary enhanced retirement package called Voluntary Early Retirement Opportunity ("VERO"). VERO was adopted to provide additional incentives for employees who were eligible to take early retirement to elect to do so. (District Court's Findings of Fact and Conclusions of Law ("FF/CL"), found in Petitioners' Appendix, at A-13).[3]

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[1] Because Respondents take issue with Petitioners' presentation of the facts of this case and allegations that the Court of Appeals made factual findings additional to those made by the District Court, Respondents set forth the "Statement of Facts" in order to preserve their right to contest Petitioners' version. *See* Sup. Ct. Rule 15.1.

[2] Pursuant to Sup. Ct. Rule 29.1, the following is a list of all subsidiary corporations of Energen Corporation:

Alabama Gas Corporation
Taurus Exploration, Inc.
Basin Pipeline Corp.
Alagasco Pipeline Company
American Heat Tech, Inc.
W & J Propane Gas, Inc.

Energen has no parent corporations. Alabama Gas Corporation, often referred to as Alagasco, has no subsidiaries. Prior to 1985, Energen Corporation was named Alagasco, Inc. For clarity, this brief refers to Energen Corporation and Alabama Gas Corporation as the "Company."

[3] Although Petitioners' recitation of facts implies the Company wanted a large number of employees to accept VERO, the District Court expressly found that the Company had no target

About eighty employees were eligible under the incentive program. Approximately fifty percent of those eligible elected to retire. (FF/CL, Petitioners' Appendix at A-13). Petitioners[4] (hereinafter referred to as "Plaintiffs") are eight of those eligible persons who elected VERO.

About two years after VERO was announced, in November of 1987, the Company announced another opportunity for enhanced early retirement, referred to as VRIP (Voluntary Retirement Incentive Program). VRIP was also a voluntary program, which provided various benefits that were greater than those obtained under VERO. (FF/CL, Petitioners' Appendix at A-14).[5]

Following the announcement of VRIP, Plaintiffs brought this action against the Company asserting,

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number in mind. (FF/CL, Petitioners' Appendix at A-15). Further, the Company's motivation in enacting VERO is irrelevant. An employer's actions and motives regarding the establishment, termination and design of a plan are not governed by ERISA's fiduciary standards, but are "settlor" functions made in its capacity as a non-fiduciary. "Labor Department Letter on Fiduciary Responsibility and Plan Terminations," *reprinted in* 13 BNA Pension Reporter 472 (1986); *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988); *Childers v. Northwest Airlines, Inc.*, 688 F. Supp. 1357, 1361 (D. Minn. 1988).

[4] James L. Barnes, Jr., Leonard Grefseng, Roy R. Kimberly, Willie H. Little, Elliott H. Moore, Lillian Northington, Joseph D. Patrick and Lellwyn B. Lackey; Lila F. Huey, who was also a plaintiff below, did not appeal.

[5] The District Court found that the goals and objectives of VERO and VRIP were different. VERO was prompted by the Company's need to reduce the managerial "head count" and was seen as an opportunity for general corporate restructuring in 1985, whereas VRIP was offered as a result of two intervening circumstances in 1987: 1) an unforeseen financially distressful situation for the Company; and 2) a change in accounting principles. (FF/CL, Petitioner's Appendix at A-15,21).

although they *voluntarily* and *without coercion* elected to take early retirement under VERO, they were induced to do so by misleading or ambiguous statements provided to them concerning that program, because VERO was characterized as a "one-time offer." (FF/CL, Petitioners' Appendix at A-13) (*See* notes 6-7, *infra*).

Contrary to the assertions in Plaintiffs' Petition (*see, e.g.*, Petition, p. i, iv), neither the District Court nor the Court of Appeals held that the Company's statements made to employees regarding VERO were "misleading" or "inaccurate." To the contrary, both courts found that Defendants provided Plaintiffs with accurate information at the time statements were made about VERO, and that the Company's intention was "to provide accurate and full information that the employees would need in order to make their own individual decisions." (FF/CL, Petitioners' Appendix at A-15,26; Appellate Opinion ("App"), Petitioners' Appendix at A-4). Moreover, the District Court found, and the Court of Appeals recognized, that when the Company decided to make VERO available in 1985, it did not contemplate or intend to make any further or later offers of early retirement. (FF/CL, Petitioners' Appendix at A-14-15; App, Petitioners' Appendix at A-4). The Company had never made this type of offer up to that point in time, (Testimony of Warren, R4-143-324; Testimony of Self, R3-144-2), and did not believe it would be able to make any such offers again on a cost-neutral basis. No such offers were anticipated in the future. (FF/CL, Petitioners' Appendix at A-15). However, a Summary Plan Description ("SPD") given to Plaintiffs prior to VERO expressly reserved the Company's right to amend the plan. (App, Petitioners' Appendix at A-8-9).

In the latter part of 1985, the Company prepared and distributed materials that communicated VERO's provisions to the employees. The Company also conducted meetings with employees. The District Court found the objective of those meetings was to announce the VERO program and give some assurance to employees that VERO was not part of any financial exigency on the part of the Company. VERO was to be purely a voluntary decision by those who would be eligible. (FF/CL, Petitioners' Appendix at A-16).

The District Court concluded the Company, in communicating information about VERO, intended to provide accurate and full information that the Plaintiffs would need in order to make their own individual decisions; "there was no intent to mislead." (FF/CL, Petitioners' Appendix at A-15). This finding was adopted on appeal by the Eleventh Circuit. (App, Petitioners' Appendix at A-2).

In both verbal and written communications, VERO was referred to as a "one-time offer."[6] By referring to VERO as a "one-time offer" in oral and written communications, the District Court found the Company intended to emphasize the necessity of eligible employees accepting

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[6] "Packages" of information consisting of the VERO communications materials and a cover letter were distributed to eligible employees. They generally outlined VERO with a comparison of data for each individual, reflecting their options between normal early retirement and VERO. (FF/CL, Petitioners' Appendix at A-16). The cover letter that accompanied the VERO communications materials refers to VERO as a "one-time offer."

VERO during the window period and no later.[7] The court found VERO was, in fact, a "one-time opportunity." (FF/CL, Petitioners' Appendix at A-18).

Plaintiffs, however, interpreted the "one-time offer" language to mean that another enhanced early retirement opportunity would not be made in the future, i.e. that the Company had foreclosed *any* possibility of offering a future similar early retirement program forever. (FF/CL, Petitioners' Appendix at A-14).[8]

By December 6, 1985, the closing date of VERO's window, Plaintiffs had accepted VERO. On December 19, 1985 the Energen Benefits Committee approved paying benefits to forty employees. On January 1, 1986, the forty employees who accepted retirement with VERO's enhanced benefits, including Plaintiffs, retired.

A year and a half later, in the summer of 1987, because of an unforeseen financially distressed situation, the Company announced its plan for VRIP. (FF/CL, Petitioners' Appendix at A-21). These proceedings followed.

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[7] The context of the cover letter in which the "one time offer" statement was made supports this intention:

> I would like to again emphasize that the program is completely voluntary. It is available for you if it best fits your personal situation. *Please keep in mind, however, that this is a one time offer. This opportunity will not be available after December 6.* (emphasis added).

(*See* Testimony of Self, R3-144-170-173; 183)

[8] At least one employee, however, did admit at trial that a Company representative informed him the "one-time offer" phrase was intended to mean he had to turn in his choice by the close of the window period. (Testimony of Little, R3-144-61).

B. Course Of Proceeding And Disposition In The Court Below

This action was filed in August 1988 by Plaintiffs, former employees of Alagasco, in the Circuit Court for Jefferson County, Alabama against Respondents. The case was removed to the United States District Court for the Northern District of Alabama, Southern Division on August 31, 1988.

Plaintiffs asserted they "retired in reliance upon a representation [by the Company that] an enhanced early retirement opportunity would be provided only on a one-time basis." (Third Amended Complaint, R1-49). Plaintiffs' suit is a result of an announcement in November of 1987 by the Company, two years after VERO was offered, of VRIP, another voluntary enhanced early retirement package.[9]

Plaintiffs alleged three claims: 1) breach of fiduciary duty through misrepresentation or through suppression of a material fact; 2) violation of ERISA, § 510, 29 U.S.C. § 1140 by constructive discharge through fraud; and 3) violation of the terms of the Energen Plan and Energen SPD. Plaintiffs sought an award reflecting the difference in benefits between VERO and VRIP, back pay, and declaratory and injunctive relief.

The matter was tried before the Honorable Samuel C. Pointer, Jr. on October 16 and 17, 1989. The trial was bifurcated with respect to liability and damages. The

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[9] The original complaint named only Alagasco as Defendant. The Third Amended Complaint added Energen Corporation, the Energen Corporation Retirement Income Plan, and the individual members of the Energen Benefits Committee, W.D. Self, R.J. Patzke, A.S. Lacy, J.A. Martin, G.C. Ketcham, D.C. Reynolds and G.C. Youngblood, as Defendants (hereinafter "Defendants" or the "Company").

District Court issued Findings of Facts and Conclusions of Law (found in Petitioners' Appendix at A-12) on October 17, 1989 with respect to liability. A separate hearing was held for damages on February 27, 1990. The issue of attorney's fees was reserved until after the appeal of this matter.

In its Findings of Fact and Conclusions of Law, the District Court found the Company and its representatives made no misleading statements regarding VERO. (FF/CL, Petitioners' Appendix at A-26). The court also found that the Company had no intent to mislead employees regarding whether there would be future similar offers of enhanced early retirement benefits at the time the Company announced and offered VERO in 1985. (FF/CL, Petitioners' Appendix at A-15).

The District Court rejected Plaintiffs' assertion that in November and December of 1985, when the Company indicated VERO was a "one time offer," the "Company might have contemplated or even intended to offer a later early retirement plan, such as VRIP." (FF/CL, Petitioners' Appendix at A-14-15). To the contrary the District Court concluded the testimony and numerous exhibits introduced at trial did not establish any future plan was intended and noted that Plaintiffs appeared to have abandoned that type of claim. (FF/CL, Petitioners' Appendix at A-15). "The evidence is clear that *at the time in late 1985 when the Company had decided to make VERO available* it did not anticipate there would be any further or later offers of early retirement." (FF/CL, Petitioners' Appendix at A-15) (emphasis added). The court specifically found the Company "believed that it would be unable to make any such offers on a cost-neutral basis, and that no such offers were, indeed, anticipated." (FF/CL, Petitioners' Appendix at A-15). The District Court found:

> [t]o the extent there was any charge in this litigation initially that there was any intentional misleading of employees, the Court finds favorably to the Defendant. The Court finds there was *no intent to mislead*. There was, indeed, an intent on the part of the Company to provide *accurate and full information* that the employees would need in order to make their own individual decisions.

(FF/CL, Petitioners' Appendix at A-15) (emphasis added).

The trial court found it was the Company's intent, when describing VERO as a "one-time offer," to emphasize the program had to be accepted or rejected within the window before December 6. (FF/CL, Petitioners' Appendix at A-14-15). The court believed, however, that Plaintiffs misunderstood the "one-time offer" to mean the Company had foreclosed *any* possibility of offering a future similar early retirement program *forever*. The court concluded the statements made by the Company were "not in and of themselves necessarily misleading, just subject to being misunderstood." (FF/CL, Petitioners' Appendix at A-26). Despite specific findings that the Company made no misleading statements and intended to provide a full and fair disclosure to Plaintiffs, the District Court held Defendants liable for misrepresentation under ERISA on the basis *the Plaintiffs misunderstood* what the Company told them. (FF/CL, Petitioners' Appendix at A-20,26).

The District Court held the Company responsible for statements it did not make, but in the court's opinion (in hindsight), should have made to employees. The District Court did not hold that the Company should have told Plaintiffs about VRIP, nor did the court hold that the

Company should have informed Plaintiffs that the Company reserved the right to make a *more favorable* special early retirement offer in the future. Rather, the court concluded the Company should have informed its employees that it reserved the right to consider making future similar offers of whatever nature. (FF/CL, Petitioners' Appendix at A-18). As the Court of Appeals noted, however, this information was contained in the SPD given to Plaintiffs.[10]

The court awarded damages in favor of Plaintiff James Barnes only,[11] concluding only Barnes relied on the misinterpretations to his detriment.[12]

Both parties cross-appealed to the United States Eleventh Circuit Court of Appeals. In its written opinion, (found in Petitioner's Appendix at A-1), the Court of

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[10] Because the District Court found the Company did not to intend to mislead the employees, but in fact intended to give full disclosure, Plaintiffs failed to prove fraud necessary for liability for constructive discharge under § 510 of ERISA, 29 U.S.C. § 1140. (FF/CL, Petitioners' Appendix at A-15).

[11] In the separate hearing on damages, the court awarded Barnes $93,664.28, reflecting the difference in benefits between VERO and VRIP, and two years' back pay. (FF/CL, Petitioners' Appendix at A-32-33).

[12] The District Court determined in order to receive the benefits they sought in the litigation, Plaintiffs had to establish they relied on some misinformation or omission, and would not have elected VERO had they been given that information. (FF/CL, Petitioners' Appendix at A-14). Because the Court of Appeals determined Defendants did not breach their fiduciary duties, it did not reach the issue of whether Plaintiffs must prove reliance. Therefore, whether proof of reliance is necessary was not an issue considered by the Court of Appeals and is not ripe for review by this Court, although Plaintiffs attempt to raise it in their Petition. *See, e.g., IBEW, AFL-CIO v. Hechler,* 481 U.S. 851, 865, 107 S.Ct. 2161, 2170 (1987).

Appeals expressly and unanimously adopted the District Court's findings of fact and referred to evidence admitted at trial that appeared in the record, but as a matter of law reversed the court's holding that the Company breached a fiduciary duty under ERISA by failing to reiterate its reservation of the right to amend the plan. (App, Petitioners' Appendix at A-2).

The Eleventh Circuit concluded that "Alagasco had told its employees the truth about VERO." (App, Petitioners' Appendix at A-8). The Court of Appeals adopted and cited to the District Court's findings of fact in reaching this conclusion:

> Alagasco had no intent to mislead the employees regarding whether any future offers would be made following the VERO offer. The evidence clearly established that, at the time Alagasco made VERO available to its employees, "it did not contemplate making any further or later offers of retirement." (R5-4). Alagasco's comments regarding VERO being a "one-time offer" were not in and of themselves misleading.

(App, Petitioners' Appendix at A-8).

The Court of Appeals then noted the legal error of the District Court:

> Despite these factual findings, the court held that Alagasco was, as a fiduciary under ERISA, liable for misrepresentation. The court found that Alagasco had committed a misrepresentation on the basis that the company's statements were subject to being misunderstood by employees.

(App, Petitioners' Appendix at A-8).

The Court of Appeals further held that, since each employee received an SPD[13] containing a reservation of the right to amend the plan, as a matter of law the employees had constructive notice of the very fact which they claim the employer should have told them – that the plan could be changed in the future. Therefore, even if the Company had a duty to inform Plaintiffs of the right to amend, the Eleventh Circuit, reversing the District Court as a matter of law, held the Company fulfilled this duty by providing the SPD. (App, Petitioners' Appendix at A-8-9). The Court of Appeals also rejected the District Court's creation of additional notice requirements under ERISA (App, Petitioners' Appendix at A-9).

The Court of Appeals alternatively held that a fiduciary cannot be liable for making a good faith, truthful statement *solely* because the statement might be subject to misunderstanding.[14] The court held that such a statement was not a "misrepresentation." To place such a burden on plan fiduciaries would be inequitable. Therefore, Defendants were not liable for misrepresentation for labelling VERO a "one-time offer." (App, Petitioners' Appendix at A-9-11).

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[13] The Summary Plan Description was introduced and admitted as Defendants' Exhibit 27 at trial and was part of the record on appeal. The Court of Appeals, therefore, properly considered it in making its determination. *See* note 26, *infra*.

[14] Plaintiffs' claims are based on the false premise that an employer has a fiduciary duty to employees regarding future plans not in effect. The Court of Appeals did not have to reach this issue because it determined that, even assuming Defendants had a fiduciary duty, they did not breach it. Defendants wish to preserve their argument, made both in the District Court and the Eleventh Circuit, that an employer's actions prior to the establishment of a plan are settlor functions. *See* note 3, *supra*.

SUMMARY OF ARGUMENT

The Court of Appeals' ruling that the SPD gave Plaintiffs notice of the Company's reservation of the right to amend is amply supported by the record and by existing law. Further, the Eleventh Circuit's alternative holding that Defendants did not breach any fiduciary duty is also correct as a matter of law. There is no duty under ERISA to disclose information regarding a future plan not in effect.

This case does not involve a conflict among the circuits. The ERISA cases cited by Plaintiffs are factually and legally distinguishable from the case at bar.

The Court of Appeals did not make any additional factual findings to those made by the District Court. Rather, the Eleventh Circuit adopted the factual findings of the District Court and relied on the record in reversing the District Court as a matter of law.

Finally, federal securities laws should not be used to supplement ERISA's reporting and disclosure requirements. ERISA's provisions should only be supplemented where ERISA does not address the issue. ERISA has express reporting and disclosure requirements that are exclusive. Additionally, this Court expressly rejected the application of federal securities laws to ERISA pension plans in *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 99 S.Ct. 790 (1979).

REASONS FOR DENYING PETITION

A. The Court of Appeals Correctly Decided this Case Based on the Facts Found by the District Court

The Court of Appeals' two alternative holdings in the instant case are legally correct, and thus, no review is

required. The court first held that, since all of the plaintiffs were given an SPD, they had notice of the SPD's provisions. This holding is consistent with those of other circuit courts.[15]

Plaintiffs apparently argue that even though an employer has revealed its reservation of the right to amend through an official plan document given to participants, it nonetheless has an *additional* duty to reiterate this reservation of rights every time it presents benefits to employees.[16] ERISA's reporting requirements do not

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[15] *See, e.g., Schultz v. Metropolitan Life Insurance Co.*, 872 F.2d 676 (5th Cir. 1989) (Employee who received copy of plan summary is "charged with knowledge of the plan" and cannot claim breach of fiduciary duty for company's failure to remind him of SPD provision); *Cummings v. Briggs & Stratton Retirement Plan*, 797 F.2d 383, 387 (7th Cir.), *cert. denied*, 479 U.S. 1008, 107 S.Ct. 648 (1986) (Plan administrators who provided participant with complete and accurate SPD did not violate fiduciary duty by failing to seek out individual participant and inform him of his rights under plan); *Arnold v. Arrow Transportation Co. of Delaware*, 926 F.2d 782, 786 (9th Cir. 1991) (Company fulfilled duty to disclose its limitation of liability under plan by providing SPD which clearly states this limitation, *even if participant did not read SPD*).

[16] Plaintiffs alleged below that certain written statements concerning VERO were "summary plan descriptions." Plaintiffs have not made that assertion in their Petition for Writ of Certiorari, and so the Supreme Court should not consider this argument. *Weinberger v. Rossi*, 456 U.S. 25, 36 n.18, 102 S.Ct. 1510, 1518 n.18 (1982). In any event, a letter to employees briefly outlining an amendment to the plan is clearly not an SPD. *See, e.g., Alday v. Container Corp. of America*, 906 F.2d 660, 665-66 (1990), *cert. denied*, 111 S.Ct. 675 (11th Cir. 1991) (where an official SPD has been provided to employees, an employer's subsequent communications to participants regarding benefits are not plan documents); *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310, 1316-17 (3d Cir.), *cert. denied*, 111 S.Ct. 2856 (1991)

require such repetitious disclosure by plan sponsors. *See* 29 U.S.C. § 1021, et seq. If the courts were to create such a duty to reiterate (which would conflict with ERISA, 29 U.S.C. § 1024, regarding when notices must be given), how often would an employer be required to make this statement before it risks losing the right – monthly? daily? Must the employer recite the entire plan or risk being held liable for an "omission"?

ERISA details the obligations of employers and administrators regarding reporting and disclosure. *See* 29 U.S.C. § 1021, et seq. The Eleventh Circuit's holding is consistent with the congressional intent of providing certainty to employers and administrators regarding disclosures under ERISA. *C.f. Ingersoll-Rand Co. v. McClendon,* 111 S.Ct. 478, 484 (1990); *Fort Halifax Packing Co., Inc. v. Coyne,* 482 U.S. 1, 9, 107 S.Ct. 2211, 2216 (1987).[17] Plaintiffs' interpretation of ERISA would wreak

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(where overview brochure lacked virtually all categories required by ERISA for SPD, and where another document called SPD exists which fulfills these requirements, overview brochure is not SPD)

[17] "It is foreseeable that state courts, exercising their common law powers, might develop different substantive standards applicable to the same employer conduct, requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction. Such an outcome is fundamentally at odds with the goal of uniformity that Congress sought to implement"

Ingersoll-Rand, 111 S.Ct. at 484. Similarly, if federal courts are free to create additional disclosure requirements, these may vary from court to court and jurisdiction to jurisdiction. "Such a situation would produce considerable inefficiencies, which the employer might choose to offset by lower benefit levels." *Fort Halifax,* 482 U.S. at 10, 107 S.Ct. at 2217. Additionally, only *after* the fiduciary had already acted would he learn from the courts

havoc on the carefully integrated notice provisions created by Congress.

The Eleventh Circuit's alternative holding that the Company cannot be liable for misrepresentation when it disclosed in good faith the information which it possessed at the time it announced VERO, is also correct as a matter of law. ERISA specifically permits an employer to amend, alter or terminate benefits and plans without consideration of the employees' interest so long as participants' accrued or vested benefits are protected. *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016, 107 S.Ct. 1893 (1987) and cases cited therein; *Young v. Standard Oil*, 849 F.2d 1039, 1045 (7th Cir.), *cert. denied*, 488 U.S. 980, 109 S.Ct. 529 (1988). There is no duty under ERISA to disclose information regarding a plan not in effect. *Trexel v. E.I. DuPont de Nemours & Co.*, 1987 U.S. Dist. LEXIS 13,973 (D. Del. 1987)(set forth in Appendix B), *aff'd*, 845 F.2d 1016 (3d Cir. 1988) (table); *citing Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986); *Sleichter v. Monsanto Co.*, 612 F. Supp 856, 859 (E.D. Mo. 1985). Therefore, it follows ERISA does not obligate the Company to divulge information regarding a future offer which is not even being considered. *Id.*; *see also Payonk v. HMW Ind. Inc.*, 883 F.2d 221, 229 (3d Cir. 1989); *Porto v. Armco, Inc.*, 825 F.2d 1274, 1276 (8th Cir. 1987), *cert. denied*, 485 U.S. 937, 108 S.Ct. 1114 (1988). There is no "duty of clairvoyance" imposed by ERISA. *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154, 1164 (6th Cir. 1988).

The District Court held the Company accountable for the employees' interpretation of its statements at the time VERO was offered, in effect making the Company the

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whether he failed to comply with some hidden requirement not set forth in the statute.

insurer of each participant's understanding. (*See* FF/CL, Petitioners' Appendix at A-18, 26). The Eleventh Circuit correctly refused to make the Company an insurer of participants' understanding as to future events and refused to impose hindsight requirements. (App, Petitioners' Appendix at A-9-11). If the District Court's rule were applied, the effect on plans and their fiduciaries and sponsors would be absurd. For example, the Company in the instant case did not offer another early retirement plan until two years after VERO, and only then after future unforeseen changes in circumstances. If the Company were held liable for Plaintiffs' mistaken belief that no new special early retirement offers would be made in the future, how long would it be bound by that misunderstanding – for ten years? twenty? forever? ERISA contemplates that employers must have the flexibility to respond to changing financial needs without being bound by "promises" they did not make or intend.

B. Plaintiffs' Petition Does Not Present Any of the Requisite Factors Which the Court Considers in Granting a Petition for Writ of Certiorari

The Supreme Court grants a Petition for Writ of Certiorari when the case presents special or important reasons for granting of the writ. Sup. Ct. Rule 10. None of the considerations that weigh in favor of granting a writ petition are present in the instant case: 1) despite Plaintiffs' assertions, no conflict between the circuits was created by the Eleventh Circuit's opinion; 2) the Eleventh Circuit has not departed from the accepted and usual course of judicial proceedings, nor sanctioned such a departure by a lower court; and 3) nothing in this case

presents an important, new decision of federal law meriting Supreme Court review.[18] To the contrary, this case involved a straightforward application of ERISA to a narrow fact pattern.

1. The Decision of the Court of Appeals Does Not Conflict with Decisions of Other Courts of Appeals

Plaintiffs argue the Eleventh Circuit's opinion conflicts with the Sixth and D.C. Circuit opinions of *Eddy v. Colonial Life Ins. Co. of America*, 919 F.2d 747 (D.C. Cir. 1990) and *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988). Additionally, while Plaintiffs state the Eleventh Circuit's decision conflicts with *Rosen v. Hotel & Restaurant Employees & Bartenders Union*, 637 F.2d 592 (3d Cir.), *cert. denied*, 454 U.S. 898, 102 S.Ct. 398 (1981), they fail to state how the two opinions conflict. These cases are all factually and legally distinguishable from the case at bar and thus do not raise a conflict warranting the grant of a petition for writ of certiorari.

Eddy v. Colonial Life Ins. Co., supra, is inapposite, because it concerned information regarding a plan

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[18] Plaintiffs also appear to argue that certain factual findings of the District Court are erroneous, such as the court's finding of no reliance by most Plaintiffs and the finding of no intent to mislead on the part of the Company. However, these allegations do not provide a reason for granting the petition. The Supreme Court accords great weight to findings of fact which have been made by the district court and approved by the court of appeals. *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 98 n.15, 104 S.Ct. 2948, 2958 n.15 (1984), *citing Rogers v. Lodge*, 458 U.S. 613, 623, 102 S.Ct. 3272, 3278 (1982). Absent exceptional circumstances, the Court will not even review such findings to determine if they are clearly erroneous. *Branti v. Finkel*, 445 U.S. 507, 512 n.6, 100 S.Ct. 1287, 1291 n.6 (1980).

already in existence, not a future plan. In the instant case, when the Company gave employees information regarding VERO, the VRIP plan was not yet in existence, let alone contemplated, and thus, no fiduciary liabilities had attached. *See, e.g., Landry v. Air Line Pilots Association*, 901 F.2d 404, 414 (5th Cir.), *modified in part on other grounds*, 901 F.2d 437, *cert. denied*, 111 S.Ct. 244 (1990) (ERISA's fiduciary duties apply "only to established 'plans'.").

Further, *Eddy* is inapplicable because the Company in the instant case did not conceal information in its possession from the employees. The *Eddy* court stated:

> A fiduciary has a duty not only to inform a beneficiary of *new* and relevant information *as it arises*, but also to advise him of circumstances that threaten interests relevant to the relationship. For example, a fiduciary bears an affirmative duty to inform a beneficiary of the fiduciary's knowledge of prejudicial acts by an employer – such as the failure of an employer to contribute to the fund as required.

Id. at 750 (citations omitted). A trustee is required to communicate " 'all material facts in connection with the transaction which the trustee *knows or should know*.' " *Id.* at 751, *quoting* Restatement (Second) of Trusts § 173, comment d (1959).[19]

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[19] *Eddy* is also distinguishable because it deals with the duties of a fiduciary who is contacted by a single plan participant with questions regarding specific terms of the plan that were not explained in the SPD, rather than as in the instant case where the employer was communicating to employees in a group. *Eddy*, 919 F.2d at 752 ("Once Eddy *indicated his predicament* to Chubb representatives, Chubb bore a fiduciary duty under ERISA to convey to Eddy complete and correct material information as to his status and his conversion options.") (emphasis added). ERISA's notice and disclosure requirements govern that duty. *See* 29 U.S.C. § 1021, et seq. Defendants com-

In any event, the Company in this case clearly complied with the standard set forth in *Eddy*.[20]

Plaintiffs complain they were not told that the Company could offer a plan at a later date. The SPD clearly reserves this right. The information was not "new" at the time VERO was discussed with the employees, so there was no need to disclose it under the *Eddy* standard.

Further, the Company under *Eddy* would not be required to tell participants about VRIP, since at the time it was explaining VERO, the Company did not know and could not have known that VRIP would be implemented in the future. (FF/CL, Petitioners' Appendix at A-15,21). Thus, there is no conflict with *Eddy*.

Berlin v. Michigan Bell, supra, is likewise distinguishable from the instant suit.[21] The Eleventh Circuit

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plied with those requirements by providing the SPD to plan participants.

[20] Respondents submit that the *Eddy* case is wrongly decided, because the D.C. Circuit created notice requirements additional to those set forth in ERISA. The notice requirements of ERISA must be the exclusive notice requirements; otherwise plan fiduciaries would have no way of knowing whether they were complying with ERISA or not. *See, e.g., Childers v. Northwest Airlines, Inc.,* 688 F. Supp. 1357, 1361-62 (D. Minn. 1988) (ERISA's detailed and uniform disclosure requirements are the only disclosure requirements, and courts would create an "impossible burden" if they required additional, non-statutory disclosures by plan entities). The common law of trusts should only be used to fill in the gaps of ERISA (*see e.g., Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 109 S.Ct. 948, 954 (1989)), not to amend the existing notice requirements. However, the instant case does not create a conflict with *Eddy*, because the Circuit Court's holding shows Respondents satisfied even the expanded notice requirements in *Eddy*.

[21] Although Defendants have always asserted and continue to assert that *Berlin* is wrongly decided, the Eleventh Circuit's

expressly held that this case was consistent with, albeit factually distinguishable from *Berlin*. Because the Eleventh Circuit held that Defendants met the standard set forth in *Berlin*, there is no conflict.

> We fail to see how a fiduciary could be held liable for making a good faith, truthful statement solely because the statement might be subject to misunderstanding. The district court, in so holding, placed an unreasonable burden upon Alagasco to predict future, unintended events. To impose such a duty is inequitable. *See Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154, 1164 (6th Cir. 1988). Alagasco could only be liable for such a predictive statement if it were a "material misrepresentation." *See id.* If, for example, Alagasco, "after *serious consideration* of a second [VERO] represented that [a later VERO offering] was not being considered or used words to that effect, such a representation would be characterized as a material misrepresentation, although no final decision had been made." *Id.* at 1164 n.7 (emphasis in original). *In the case before us, Alagasco never considered that a later offer would be made when it stated that VERO was a one time offer. Therefore we find that Alagasco made no material misrepresentation.*

(App, Petitioners' Appendix at A-10-11).[22]

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opinion does not create a conflict with the erroneous portions of *Berlin*.

[22] Plaintiffs' attempts to mischaracterize *Berlin* are without substance. (*See* Petitioners' Brief at 17-18 n.4) It is never "fair" to expect a plan fiduciary to disclose that which it does not and cannot know. Defendants could not have informed Plaintiffs about VRIP, since the Company did not plan to offer a future special early retirement offer, and in fact believed such a future offer to be impossible. *Berlin* does not require such disclosure. Even if Plaintiffs believe such disclosure should be required, however, since no other circuit court has yet required it, there is

Plaintiffs make no effort to show how the Eleventh Circuit's opinion conflicts with the Third Circuit's opinion in *Rosen. Rosen* is clearly inapplicable, for its sole holding was that an administrator has a duty to disclose the fact that the employer failed to make required plan contributions.[23]

Plaintiffs also allege that the opinions of the Eleventh Circuit and the District Court regarding the need for proof of reliance conflict with the Sixth Circuit's opinion in *Edwards v. State Farm Mut. Auto Ins. Co.*, 851 F.2d 134 (6th Cir. 1988). In *Edwards*, the Sixth Circuit, in *dictum* stated that plan participants need not prove reliance on a statement *in an SPD that conflicted with the actual plan language.*[24] The District Court in the instant case held, in

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no conflict among the circuits on this issue. As for the reservation of the right to amend the plan in the future, the Company had already disclosed that information, as a matter of law and pursuant to ERISA's requirements, via the SPD.

[23] *Rosen* was not even an ERISA case, but was decided under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, *Rosen*, 637 F.2d at 596 & n.5, although some ERISA concepts were applied. The holding in *Rosen* was a narrow one – that a fiduciary has the duty to inform plan participants that the employer has failed to make required contributions to the plan. Further, the fiduciaries had a duty to take action against the employer for failing to contribute to the plan. *Id.* at 599-600. These holdings do not conflict with that of the Eleventh Circuit in the instant case.

[24] There was no conflict between the SPD and the Plan, nor was there a conflict between the Company's discussion of VERO and the SPD. The Eleventh Circuit has expressly held that where the SPD contains a reservation of the right to amend, a failure to reiterate that reservation in subsequent communications with participants is not a contradiction of the SPD. *Alday v. Container Corp. of America*, 906 F.2d 660, 666 n.15. (11th Cir. 1990), *cert. denied*, 111 S.Ct. 964 (1991). No conflict among the circuits exists on this issue.

order to recover damages, Plaintiffs had to prove they relied on their "misunderstanding" of Defendants' statements and show that they would not have taken VERO if they had understood the truth. The Eleventh Circuit, however, did not reach the issue of reliance. The court held there were no misstatements or omissions, and therefore it was not required to reach the issue of reliance. Since the issue was not even discussed by the Eleventh Circuit, its opinion could not possibly conflict with *Edwards*. The issue is not ripe for review. *See* note 12, *supra*.[25]

Plaintiffs also allege the Eleventh Circuit's holding that the Company's good faith, truthful statement was not a breach of fiduciary duty conflicts with the decision of the Seventh Circuit in *Leigh v. Engle*, 727 F.2d 113 (7th Cir. 1984). *Leigh* is neither factually nor legally similar to the instant suit. The issue in that case was whether the subjective good faith of a trustee managing plan assets was relevant in determining liability for violations of ERISA's prohibited transaction provision, 29 U.S.C. § 1106.

In *Leigh*, plan fiduciaries invested plan assets in companies involved in highly speculative takeover contests

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[25] Even if Plaintiffs are permitted to raise this issue, however, the *Edwards* case is factually and legally distinguishable from the instant case. In *Edwards*, the court held that an employee who received an SPD containing a provision expressly contrary to that of the Plan document reasonably relied on the SPD, and the terms of the SPD controlled over the provisions of the Plan. *Edwards*, 851 F.2d at 136-37. The court in *dictum* stated that proof of reliance on the misstatement in the SPD is not required. *Id*. at 137. In the instant case the SPD and the Plan both contained an express reservation of the right to amend and thus are not conflicting. (*See* Def. Exhibit 22, Article 8.1; Def. Exhibit 27, p.26).

after investing their personal funds in those corporations. *Id.* at 116. Specific ERISA statutes prohibit *per se* the use of plan assets for the benefit of a fiduciary or third parties (*see* 29 U.S.C. §§ 1104, 1106) and subjective good faith is irrelevant in deciding whether these statutory requirements have been breached. *Id.* at 124. The instant case, however, involves claims of misrepresentation, and the good faith belief by the speaker is clearly relevant. A misrepresentation is a statement made with knowledge that it is false or with reckless disregard as to its truth or falsity, with an intent to induce reliance. Prosser & Keaton, *Torts* § 105, p. 728; § 107, p. 740-41 (5th ed. 1984). A good faith belief in the truth of the statement is, therefore, key to the issue of liability.

2. The Eleventh Circuit Did Not Make Any Findings of Fact Additional And/Or Contrary to Those Found by the Trial Court

Plaintiffs assert that the Court of Appeals made several "findings of fact" additional and/or contrary to those made by the District Court, specifically 1) that Alagasco "told the truth about VERO" and "made no untruthful statements" and 2) that the participants had constructive notice of the contents of the SPD.

The Eleventh Circuit made no new factual findings. Rather, the Court of Appeals adopted the findings of fact of the District Court and reviewed the record of the case,[26] and reversed the District Court as a matter of law.

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[26] Plaintiffs appear to argue that the Eleventh Circuit did not have the right to examine all of the admitted exhibits in the record and base its opinion on those exhibits. A court of appeals is clearly entitled, indeed has a duty to review the record of the case, and is not limited to the evidence cited by the district court

a. Alagasco told the truth

The Court of Appeals did not find facts contrary to the District Court when concluding that "Alagasco had told its employees the truth about VERO." (App, Petitioners' Appendix at A-8). The only possible conclusion that can be drawn from the District Court's findings is that Defendants' description of VERO as a one-time offer was an accurate and objective statement of the facts as they existed at the time the statement was made, with no intent to mislead. In other words, "the truth."[27] The Court of Appeals' statement that the District Court found Defendants told the truth is simply the Eleventh Circuit's summary of the findings in the trial court.

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in its opinion. *See, e.g., Coopers & Lybrand v. Livesay*, 437 U.S. 463, 473-74, 98 S.Ct. 2454, 2460 (1978) ("The district court must take the evidence, entertain argument, and make findings, and the court of appeals must review the record and those findings . . . "); *DeBruyne v. Equitable Life Assurance Society of U.S.*, 920 F.2d 457, 463-64 & n.10 (7th Cir. 1990) (court of appeals may affirm on any ground supported by the record). If the district court fails to consider the issue below, and hence makes no factual findings, where the record permits only one resolution of the issue, the court of appeals may rule on the issue and is not required to remand. *Pullman-Standard v. Swint*, 456 U.S. 273, 292, 102 S.Ct. 1781, 1792 (1982); *FDIC v. Kasal*, 913 F.2d 487, 493 (8th Cir. 1990). The Court of Appeals correctly ruled that the only possible resolution of the issue (whether Plaintiffs were told that the Company reserved the right to amend the Plan) was a determination that the Company provided such information. The SPD unambiguously revealed the reservation of right and so, as a matter of law, Plaintiffs had notice.

[27] Webster's Dictionary defines "truth" as follows: "1. a being true; specif., a) sincerity; honesty b) conformity with fact c) reality; actual existence d) correctness; accuracy 2. that which is true 3. an established fact . . . "

Plaintiffs allege that statements by the Company that VERO was a "one-time opportunity" violated ERISA because, two years later VRIP, a different (more favorable) plan, was offered. The fact remains, however, that the District Court found that, in describing VERO as a "one-time offer," no future plan was intended or contemplated by the Company *at that time,* and that VERO was in fact intended as a "one-time opportunity." (FF/CL, Petitioners' Appendix at A-14-15). The District Court further found that the Company, at the time it offered VERO, "believed that it would be unable to make any such [future] offers on a cost-neutral basis, and that no such offers were, indeed, anticipated." (FF/CL, Petitioners' Appendix at A-15).

The District Court found the Company intended to provide accurate and full information:

> To the extent there was any charge in this litigation initially that there was any intentional misleading of employees, the Court finds favorably to the defendant. The Court finds there was no intent to mislead. There was, indeed, an intent on the part of the company to provide *accurate and full information* that the employees would need in order to make their own individual decisions.

(FF/CL, Petitioners' Appendix at A-15) (emphasis added).

The Court of Appeals adopted these findings; the court also held that Defendants did not fail to tell Plaintiffs about the reservation of the right to amend, even if there was such a duty, since the SPD as a matter of law gave Plaintiffs constructive notice of that fact. Therefore, the Company gave a full, truthful disclosure as a matter of fact and law.

b. The SPD Provided Notice of the Company's Right to Amend the Plan

The Eleventh Circuit's reliance on the SPD is appropriate to support its alternate holding that the Company provided employees with notice of the right to amend the Plan via the SPD. *See* note 26, *supra*. The SPD was admitted into evidence by the District Court (Defendants Exhibit 27) and was thus part of the record on appeal. Plaintiffs do not contend they did not receive the SPD. Thus, the Court of Appeals' conclusion that Plaintiffs were notified of this reservation is simply a straightforward conclusion reached from undisputed facts. (*See also* Part A., *supra*).

3. Whether Securities Laws Should Be Used to Supplement ERISA Is Not an Important Issue of Federal Law and Does Not Create a Conflict in the Circuits.

As noted above, the Eleventh Circuit did not reach the issue of reliance, and so did not reach the issue of whether reliance principles should be borrowed from federal securities act case law. Thus, the issue is not ripe for review by this Court. *See* note 12, *supra*. Even if the Court should reach this issue, however, it should reject this argument as a reason to grant the Petition for Writ of Certiorari. Contrary to Petitioners' assertions, ERISA's reporting and disclosure requirements do not contain a "void" that would need to be filled by borrowing from other statutes. Rather, these regulations reflect a balancing of interests by Congress that should not be disturbed by the courts.[28]

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[28] The Eleventh Circuit implicitly recognized the exclusivity of ERISA's reporting and disclosure provisions when it

Plaintiffs assert that the Court of Appeals' refusal to "borrow" a presumption of reliance from case law interpreting federal securities laws creates a conflict in the circuits. Nowhere, however, do Plaintiffs point to an appellate case where a circuit court approved or rejected such analysis. There is no conflict among the circuits on this issue.

Plaintiffs also allege that the issue of whether or not to borrow securities law analysis is an important and undecided issue of federal law. Plaintiffs cannot create an "important" and "unsettled" question of federal law by going completely out into left field.

Plaintiffs assert that federal securities laws should be used to "supplement" ERISA's reporting and disclosure requirements. The only case cited by Plaintiffs for this proposition is *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948 (1989). Plaintiffs reliance on *Bruch* is misguided. In fact, *Bruch* counsels against such an extension of securities law principles. In *Bruch*, this Court noted that ERISA is a "comprehensive and reticulated statute." 109 S.Ct. at 953, *quoting Nachman Corp. v. PBGC*, 446 U.S. 359, 361, 100 S.Ct. 1723, 1726 (1980). Only where ERISA does not *expressly* provide guidance did Congress, as shown by the legislative history of ERISA, intend that the common law of trusts (not securities) should be used to fill in the gaps of ERISA. 109 S.Ct. at 954.[29] There are

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disapproved of the District Court's creation of additional notice requirements. (App, Petitioners' Appendix at A-9).

[29] In *Bruch*, the Supreme Court noted that nowhere does ERISA provide a standard for reviewing a plan administrator's or trustee's interpretation of the plan. The Court observed that the legislative history of ERISA showed Congress intended courts to borrow from the common law of trusts to fill in the

no gaps in ERISA regarding reporting and disclosure requirements. Rather, ERISA contains *express* provisions governing reporting and disclosure. *See* 29 U.S.C. § 1021, et seq. Congress chose these specific requirements and by inference rejected any others. *Cf. Pilot Life Insurance Co. v. Dedeaux,* 481 U.S. 41, 54, 107 S.Ct. 1549, 1556 (1987).[30]

Additionally, Plaintiffs have failed to cite any legislative history demonstrating a congressional intent to fill in gaps in ERISA with federal securities law. In fact, this Court has already rejected attempts to apply securities law requirements to pension plans. In *International Brotherhood of Teamsters v. Daniel,* 439 U.S. 551, 99 S.Ct. 790 (1979) the Court, in a case regarding whether the Securities Exchange Act of 1934 should be applied to pension plans, held that compulsory, noncontributory pension plans were not covered by Section 10(b) of the 1934 Act, 15 U.S.C. § 78(j) and Rule 10b-5, 17 C.F.R. § 240.10b-5.[31] The Court held that ERISA's extensive regulation of the substance of pension plans, *coupled with its detailed reporting requirements,* when contrasted with the indefinite obligations under the Securities Act of 1934, demonstrates

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gaps in ERISA. *Bruch,* 109 S.Ct. at 953-54. The Court thus borrowed a standard of reviewing decisions of trustees under trust law.

[30] " 'The six carefully integrated civil enforcement provisions found in § 502(a) of the statute . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.' " *Pilot Life,* 481 U.S. at 54, 107 S.Ct. at 1556, *quoting Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134, 146, 105 S.Ct. 3085, 3092 (1985) (emphasis in original).

[31] In other contexts, the Fifth Circuit has also cautioned against expanding the reach of Rule 10b-5, especially where other federal laws already regulate that area. *See, e.g., Woodward v. Metro Bank of Dallas,* 522 F.2d 84, 92 (5th Cir. 1975).

that ERISA should be the exclusive governing statute for pension plans and that the federal Securities Acts should not apply. *Daniel*, 439 U.S. at 569-70, 99 S.Ct. at 802.

> The existence of this comprehensive legislation governing the use and terms of employee pension plans severely undercuts all arguments for extending the Securities Acts to noncontributory, compulsory pension plans. Congress believed that it was filling a void when it enacted ERISA. . . . *Not only is the extension of the Securities Acts by the court below unsupported by the language and history of those Acts, but in light of ERISA it serves no general purpose.* . . . Whatever benefits employees might derive from the effect of the Securities Acts are now provided in more definite form through ERISA.

Daniel, 439 U.S. at 569-70, 99 S.Ct. at 801-02 (emphasis added). The same detailed regulations and reporting requirements discussed in *Daniel* applied to VERO. The applicability of federal securities laws to ERISA pension plans has already been definitively decided by this Court and the Court of Appeals' refusal to borrow from securities law does not merit review.

Further, the securities case relied upon by Plaintiffs, *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 92 S.Ct. 1456 (1972), deals with a situation not analogous to the one presented here. The Court in *Affiliated Ute* held that because federal securities laws *expressly* require disclosure of all material facts, plaintiff investors were not required to prove detrimental reliance on a failure to disclose such material facts. 406 U.S. at 152-55, 92 S.Ct. at 1470-72. ERISA, however, contains no such requirement.[32]

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[32] Plaintiffs assert that ERISA also expressly requires disclosure of all material facts, but the only source of that alleged

Congress enacted specific disclosure requirements under ERISA, *see* 29 U.S.C. § 1021, et seq., but did not include a duty to disclose "all material facts." If Congress had intended to place such an onerous burden on employers and other fiduciaries, it would certainly have done so in a direct manner.[33]

CONCLUSION

Because Plaintiffs have failed to show any proper reason for granting a writ of certiorari, Respondents respectfully request the Court deny the Petition.

Respectfully submitted,

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requirement cited by Plaintiffs is federal securities law. Plaintiffs' reasoning is circular and unpersuasive.

[33] In any event, the District Court held that the Company gave Plaintiffs all material facts of which it had knowledge. It merely believed that the Company should have reiterated its reservation of the right to amend the Plan. (FF/CL, Petitioners' Appendix at A-15).

APPENDIX A

STATUTES

15 U.S.C. § 78j:

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale, of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5, 17 C.F.R. § 240.10b-5:

§ 240.10b-5

It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the sale or purchase of a security.

29 U.S.C. § 1021:

§ 1021. Duty of disclosure and reporting

(a) Summary plan description and information to be furnished to participants and beneficiaries. The administrator of each employee benefit plan shall cause to be furnished in accordance with section 104(b) [29 U.S.C. § 1024(b)] to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan –

> (1) a summary plan description described in section 102(a)(1) [29 U.S.C. § 1022(a)(1)]; and
>
> (2) the information described in sections 104(b)(3) and 105(a) and (c) [29 U.S.C. §§ 1024(b)(3), 1025(a) and (c)].

* * *

29 U.S.C. § 1022:

§ 1022. Plan description and summary plan description
(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 104(b) [29 U.S.C.

§ 1024(b)]. The summary plan description shall include the information described in subsection (b), shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 104(b)(1) [29 U.S.C. § 1024(b)(1)].

(2) A plan description (containing the information required by subsection (b)) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 104(a)(1) [29 U.S.C. § 1024(a)(1)]. Any material modification in the terms of the plan and any change in the information described in subsection (b) shall be filed in accordance with section 104(a)(1)(D) [29 U.S.C. § 1024(a)(1)(D)].

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; and the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of

the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for redress of claims which are denied in whole or in part (including procedures required under section 503 of this Act [29 U.S.C. § 1133]).

29 U.S.C. § 1024:

§ 1024. Filing and furnishing of information

* * *

(b) Publication of summary plan description and annual report to participants and beneficiaries of plan. Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary plan description, and all modifications and changes referred to in section 1022(a)(1) of this title –

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part.

The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in section 1022 of this title which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section 1022 of this title every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 1022(a)(1) of this title, a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

(2) The administrator shall make copies of the plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments under which the plan was established or is operated available for examination by any plan participant or beneficiary in the principal office of the administrator and in such other places as may be necessary to make available all pertinent information to all participants (including such places as the Secretary may prescribe by regulations).

(3) Within 210 days after the close of the fiscal year of the plan, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, a copy of the statement and schedules, for such fiscal year, described in subparagraphs (A) and (B) of section 103(b)(3) [29 U.S.C. § 1023(b)(3)(A), (B)] and such other material (including the percentage determined under section 103(d)(11) [29 U.S.C. § 1023(d)(11)] as is necessary to fairly summarize the latest annual report.

(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation proscribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

(c) **Statement of Rights.** The Secretary may by regulation require that the administrator of any employee benefit plan furnish to each participant and to each beneficiary receiving benefits under the plan a statement of the rights of participants and beneficiaries under this title.

* * *

29 U.S.C. § 1140:

§ 1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, the title, section 3001 [29 U.S.C. § 1201], or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding related to this Act or the Welfare and Pension Plans Disclosure Act. The provisions of section 502 [29 U.S.C. § 1132] shall be applicable in the enforcement of this section.

APPENDIX B

JAMES J. TREXEL, Plaintiff v. E.I. DU PONT DE NEMOURS & COMPANY, Defendant

Civil Action No. 85-759-JRR

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

1987 U.S. Dist. LEXIS 13973

September 4, 1987

COUNSEL: [*1]

David R. Hodas, Esquire of Potter, Carmine & Hodas, Wilmington, Delaware, Attorney for Plaintiff

Richard D. Allen, Esquire of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, OF COUNSEL: Jerry H. Brenner, Esquire of E. I. du Pont de Nemours & Co., Inc., Wilmington, Delaware

OPINION BY: ROTH

OPINION: MEMORANDUM OPINION

ROTH, District Judge

Plaintiff James J. Trexel seeks an order directing defendant E. I. DuPont de Nemours & Company, Inc. (DuPont) to pay him an early retirement incentive or its equivalent under any one of several DuPont retirement plans. Trexel alleges that DuPont's failure to pay him a special retirement benefit constitutes a breach of an oral contract, a fraudulent misrepresentation and a violation of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 et seq. DuPont disputes these allegations and has moved for summary judgment. We find no

legal basis for plaintiff's claims and grant defendant's motion for summary judgment.

I. Background.

Trexel began working for DuPont in 1950. After holding a variety of positions, Trexel was transferred to the Legal Department in 1973 where he worked until his retirement on December 31, 1984. Within the Legal [*2] Department, Trexel was assigned to a small group which handled the labeling of DuPont products, registration of pesticides and other tasks. In 1980, Trexel was promoted to head of this labeling group when the senior person retired.

In the early 1980s, at the time that Trexel was in charge of the labeling group, DuPont began a program to reduce overall costs. This was to be accomplished in part by substantially decreasing the total number of employees. As part of this plan, DuPont adopted and implemented the Voluntary Termination Incentive Program (VTIP) in 1982, which provided incentives for individuals nearing retirement age to retire earlier than planned. This new program was only offered in those departments or sites which had an excess number of employees. In 1982, VTIP was offered in the Legal Department, but Trexel chose not to retire at that time.

In the spring of 1984, Trexel proposed to William E. Kirk, Chief Counsel of the General Legal Division, that Trexel's job be eliminated by transferring his responsibilities to others. In return, Trexel would receive an early retirement incentive and retire. Kirk told Trexel he knew of no special retirement plan then in effect [*3] but

permitted Trexel to bring the matter up before William MacIntyre, one of the two Assistant General Counsels for DuPont. Trexel discussed the proposal with MacIntyre who in turn discussed it with Jack Schmutz, DuPont's General Counsel. Schmutz thought the proposal should be considered and instructed MacIntyre to explore both the transfer of Trexel's job functions and the possibility of an early retirement incentive.

In the months following the proposal, Trexel was in contact with MacIntyre as to the progress of the efforts to obtain an early retirement incentive. Trexel stated that he was confident throughout this period that there would be no problem obtaining the early retirement benefits. He was so confident, in fact, that he put his house in Wilmington up for sale as he planned to move to San Diego upon retiring. In spite of Trexel's optimism, he admitted that he had received two negative comments which made it seem uncertain that he would qualify for a retirement incentive. He also conceded that MacIntyre had never told him that his receipt of the benefits was a certainty. At best, MacIntyre had told Trexel that "things look[ed] pretty good." Eventually, DuPont's Employee Relations [*4] Department (ERD) determined that Trexel did not qualify under any existing early retirement plan.

At the same time that the early retirement incentive was being explored, efforts were being made at DuPont to transfer Trexel's job responsibilities. In the early fall of 1984, after months of discussion, the Agricultural Chemicals (AgChem) Department finally agreed to the transfer of Trexel's labeling and registration of pesticides functions. The transfer included the reassignment to AgChem

of a member of the group who assisted Trexel. An agreement was also reached by early fall of 1984 to transfer the remaining labeling functions to another department.

On October 29 or 30, 1984, Schmutz and Howard Rudge, the other Assistant General Counsel, met with Trexel and told him of ERD's decision that he did not qualify for an early retirement incentive. They then offered Trexel a position as a lobbyist in the Government Affairs Section of the Legal Department as an alternative to retirement without the incentive. The lobbyist position became available because Dan Frawley, the person who was to fill the job, won the Wilmington Democratic mayoral primary and was considered a likely winner in the [*5] upcoming general election.

Trexel was very upset by ERD's conclusion and requested a review of that decision. Trexel subsequently spoke with Charles E. Welsh, a senior vice-president of DuPont and twice with Gordon Smyth, the head of ERD. The result of these meetings was only a reaffirmation to Trexel that he did not qualify for special benefits under any existing plan. Consequently, Trexel reluctantly accepted the lobbyist position to wait until the next retirement incentive was offered.

On November 15, 1984, about a week after accepting the lobbyist position, Trexel ran into Schmutz on the ground floor of the DuPont building. Trexel told Schmutz that he was going on vacation and would not begin the new job until the beginning of 1985. Even then, he would only continue working until he could obtain an early retirement incentive. In response, Schmutz stated that he had recently contacted the highest person in ERD and

had been assured that no incentive was coming in 1985 and that even if any did, the Legal Department had no excess personnel so that no one in that department would qualify, including Trexel. The effect of this statement by Schmutz, coupled with Trexel's apparent ambivalence [*6] towards accepting the lobbyist position, caused Trexel to immediately change his plans and decide to retire.

On the following day, November 16, Trexel announced his retirement, effective December 31, 1984. He left on vacation and returned in early December and worked until the end of the month. He made no further inquiries concerning a possible early retirement incentive even though rumors of such a program continued. Trexel retired on December 31, 1984.

In late January, 1985, DuPont announced a company retirement incentive program, know as Early Retirement Option (ERO), for which Trexel would have qualified if he had not retired. After the announcement, Trexel contacted DuPont with a request that it review its position with regard to his benefits. Schmutz reaffirmed that Trexel would not receive an incentive and that because Trexel had retired on December 31, 1984, he did not qualify for the ERO.

In 1984 there were two formal programs for retirement incentives. The first was VTIP, which required an excess in a particular department before the incentive could be offered. The second was the Administrative No-Work Program (ANWP). This program provided an early retirement incentive [*7] if a person's position was eliminated and the only job available required a geographic

relocation. Trexel's lobbyist position did not require relocation.

In addition to these two plans, the Severance Review Committee, the committee which had to approve the ANWP, gave a one time authorization to another department to write an employee a benefit check for an amount within five thousand dollars of what would be received under the ANWP. Such a payment was never made to any other employee and was never pursued by the Legal Department on Trexel's behalf or on behalf of anyone else.

During November, 1984, at the time that Trexel and Schmutz had their conversation on the ground floor of the DuPont building, Gordon Smyth, the head of ERD, was conducting a review of the company-wide rolls and developing a recommendation to the Executive Committee of the Board of Directors that the company consider a broader incentive program in 1985. It is undisputed that Mr. Schmutz did not know at the time he made his statements to Trexel on November 15 that such a review was in progress. At the end of November, 1984, Smyth made his recommendation to the Executive Committee. Thereafter, a task force [*8] was appointed to develop a specific proposal.

Sometime around the middle of December Schmutz learned about the work of the task force. He concluded that he should not advise Trexel of that work for several reasons. First, his statements to Trexel in November had been truthful. Second, the information had been given to him in his position as General Counsel and was, therefore, privileged. Third, the work of the task force was in

the planning stages and no concrete decision had been reached. Fourth, it would be difficult to tell Trexel without revealing the same information to other employees.

On January 4, 1985, the formal proposal of the task force outlining the ERO was presented to the Executive Committee. On January 11, the plan was approved and it was announced on January 29, 1985, about one month after Trexel retired. Had Trexel still been an employee of DuPont, he would have qualified for the ERO at the time it was offered.

II. Discussion.

Federal Rule of Civil Procedure 56(c) provides that a party is entitled to summary judgment if the pleadings and record show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter [*9] of law. In reaching this determination, the burden is on the moving party. *Adickes v. S.H. Kress, Co.*, 398 U.S. 144, 157 (1970). The Court must view any factual inferences drawn from the evidence in a light most favorable to the non-moving party. *Id.*

Plaintiff's amended complaint contains two counts. Count I outlines Trexel's state law claims and alleges that: (1) DuPont breached its contract with Trexel to provide him with a retirement incentive, and; (2) DuPont, through Mr. Schmutz's statements to plaintiff on November 15, 1984 and a failure to subsequently correct those statements, tortiously and wrongfully misrepresented to Trexel that there would be no early retirement incentive upcoming in 1985 and that plaintiff would not qualify even if one were upcoming. Plaintiff contends that,

because of these alleged actions by defendant, he [sic] entitled to benefits under the VTIP, the ANWP, the 1985 ERO, or equivalent benefits in the amount of $44,497.37 [sic]

Count II contains plaintiff's claims under ERISA wherein Trexel contends he is entitled to the same benefits he seeks in Count I. Under ERISA plaintiff alleges that: (1) DuPont breached its fiduciary duty to Trexel by failing to keep [*10] him fully informed of plans for the ERO programs of 1985 as well as by failing to fulfill an agreement to pay a retirement incentive; (2) DuPont constructively discharged Trexel by terminating his job functions and offering him the lobbyist position, and (3) DuPont discriminated against Trexel by deliberately providing him with misinformation.

A. Preemption of State Law Claims by ERISA.

ERISA contains a broad preemption provision which states:

> Except as provided in subsection (b) of this section, the provisions of this subchapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in Section 1003(a) of this title. . . .

29 U.S.C. § 1144(a). Thus, ERISA preempts any state law which relates to employee benefit plans. Plaintiff's state law claims for breach of contract and tortious misrepresentation would, therefore, be preempted by ERISA if they relate to an employee benefit plan. *See Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *aff'd,*

___ U.S. ___, 106 S.Ct. 3267, 91 L.Ed. 2d 558 (1986); *Kuntz v. Reese*, 760 F.2d 926, 934-35 (9th Cir. 1985); *Haeffle v. Hercules, Inc.*, [*11] No. 85-722 (D. Del. June 8, 1987).

The preemption provision of ERISA is to be read broadly to effect the intent of Congress to establish an integrated, uniform regulatory scheme with respect to ERISA plans. *Metropolitan Life Ins. Co. v. Mass.*, 471 U.S. 724 (1985); *McMahon v. McDowell*, 794 F.2d 100, 106 (3d Cir. 1986). A law "relates to" an employee benefit plan if it "has a connection with or reference to such a plan," rather than if it simply covers specific subjects which are covered by ERISA. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-98 (1983).

Plaintiff has admitted in his amended complaint, and it is clear to the Court, that the DuPont VTIP, ANWP and 1985 ERO plans were all governed by ERISA. Amended Complaint para. 21. Therefore, any state law claim for benefits under any of these plans is preempted by ERISA. Preemption does not mean that plaintiff is left without, [sic] an avenue of redress for the alleged wrongs. Where ERISA does not specifically address the issues of contract formation and misrepresentation, federal common law will be applied as "necessary to fill in intersticially [sic] or otherwise effectuate the statutory pattern enacted in the large by Congress." [*12] *Haeffle*, slip.op. at 6 (*quoting Van Orman v. American Ins. Co.*, 680 F.2d 301, 312 (3d Cir. 1982) (*quoting United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973)).

Plaintiff contends, however, that his claim for a lump sum payment is not related to any of these plans and, thus, is not preempted. Plaintiff claims that DuPont could

have avoided breaching its contract with Trexel without resorting to any of the benefit plans under ERISA by simply writing him a check from funds outside of these plans which approximated the amount he would have received under the ANWP. Trexel bases his position that he is entitled to such a payment on a memo from C. W. Borden, Jr. (Borden Memo), in which Borden discusses the payment of a similar lump sum to another DuPont employee.

We find that Trexel's claim that he is entitled to a one time payment outside of a qualified benefit plan, [sic] has absolutely no basis in fact. The record in this case, which includes Trexel's own deposition testimony, gives no indication that there was ever even an offer made by the plaintiff, let alone an acceptance by DuPont, which focused on such an open ended payment of benefits. Trexel testified [*13] throughout his deposition that under the contract he understood that he was to receive a special retirement benefit only if he qualified for it under some existing plan:

> If they could determine that I would qualify, then we would go ahead with eliminating my job. The two were tied together.

(Trexel dep. at 38).

> Q. At that time did you have in mind that there was some incentive program under which you would qualify?
>
> A. Yes.

(*Id.* at 35).

Q. So as of May 3, 1984, the only incentive program that you had in mind you qualified for was the [VTIP]. Is that correct?

A. And whatever this vague program that applied to me as a result of the contact with MacIntyre.

(*Id.* at 59).

Q. During the period up until October 28, 1984 what was the retirement incentive you expected to receive?

A. Again, I assumed – no one had – and this sort of, on hindsight – well I assumed, and no one ever told me when I asked, that it was this vague incentive that was equivalent to a [VTIP] which later turned out to be the administrative no-work incentive.

(*Id.* at 89).

Q. And when you made the proposal, the only specific retirement incentive program that [*14] you had in mind was the [VTIP] program. Is that right?

A. That was what I – I believe so.

(*Id.* at 107).

Q. If I understand what you're saying, it is that as of the end of the meeting you had learned that there was a program under which you might or might not qualify for an incentive and Mr. MacIntyre was going to investigate that?

A. Yes.

(*Id.* at 109) (emphasis added).

Thus, Trexel's own understanding was that he would receive the incentive benefit only if he qualified under a DuPont program. There is no evidence that the one time payment made to another DuPont employee, memorialized in the Borden Memo, was anything other than a special incentive given to one employee to encourage him to go with another corporation that had purchased the business and needed his expertise. The Borden Memo itself is the only evidence which in any way touches on this lump sum payment, but it make no mention of the authority or circumstances surrounding the payment or even the amount paid. Moreover, there are no facts in the record to indicate that such a payment was made under an existing plan for which Trexel could have qualified or that there was an agreement, outside of any existing [*15] plan, to make such a payment. Without such factual evidence in the record, there is no basis upon which we might permit plaintiff's claim on this issue to proceed to trial.

B. ERISA Claims.

1. Breach of Fiduciary Duty.

Trexel's claim for breach of fiduciary duty under ERISA is divided into two distinct claims, one for misrepresentation and one for breach of contract. Trexel's misrepresentation claim arises from Mr. Schmutz's statements to Trexel on the ground floor of the DuPont building on November 15, 1984.

Plaintiff has conceded that DuPont had no obligation under ERISA to provide him with information on the

upcoming ERO before the plan went into effect. *See Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986); *Sleichter v. Monsanto Co.*, 612 F.Supp. 856, 859 (E.D. Mo. 1985). Trexel's argument centers on the contention that once Schmutz chose to speak on November 15, he imposed upon DuPont the duty to correct the statement when Schmutz became aware that it was at least partially wrong.

However, it appears to be a distinction without a difference. Nothing in the statutory language of ERISA indicates that there is a duty to disclose information on benefit [*16] plans before they take effect. Moreover, we could find no federal case law to support plaintiff's conclusion that there is an exception to this rule. On the contrary, there are many cases which state that such a duty does not exist, although plaintiff's suggested exception is not an issue in these cases. *See, Stanton*, 792 F.2d at 435; *Fine v. Steel*, 699 F.2d 1092, 1094 (11th Cir. 1983); *Fenton Industries v. National Shopmen Pension Fund*, 674 F.2d 1300, 1306 (9th Cir. 1982); *Sleichter*, 612 F.Supp. at 859; *Sutton v. Weirton Steel Div. of National Steel*, 567 F.Supp. 1184, 1196 (N.D. W.Va. 1983). We will not read an exception into the statutory language or federal common law interpreting that language where none currently exists. Consequently, Trexal [sic] has no legal basis for maintaining a claim for misrepresentation under ERISA.

In addition, the principal holding in the *Stanton* case was that the plaintiff was not a "participant," under ERISA, in the future benefit plan since it went into effect after he retired. As a result, Stanton lacked the standing and subject matter jurisdiction to sue for benefits under the plan. Such a holding also applies to Trexel.

ERISA [*17] defines "participant" as "any employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer . . . or whose beneficiaries may be eligible to receive any such benefit." 29 U.S.C. § 1002(7). A civil action under ERISA may only be brought by a plan "participant," "beneficiary," "fiduciary," or the Secretary of Labor. 29 U.S.C. § 1132(a)(2). This is both a jurisdictional and a standing requirement. *Stanton,* 792 F.2d at 434.

The "may become eligible to receive a benefit" language in the statute does not refer to an employee who retires before the plan is implemented but rather to a "current employee who was already covered by the present terms of a plan, but who has not yet acquired enough tenure for his benefits to vest." *Id.* at 435. *See also Jackson v. Sears, Roebuck & Co.,* 648 F.2d 225, 227 (5th Cir. 1981); *Haeffle v. Hercules, Inc.,* No. 85-722 (D.Del. June 8, 1987). Trexel was not in the category of an employee who needed more time to allow his benefits to vest. Therefore, in addition to there being no duty to disclose information on a pending benefit plan, Trexel [*18] has no standing nor jurisdiction to sue for damages on the 1985 ERO since he retired before the plan was ever approved, announced or implemented.

Trexel also claims a breach of fiduciary duty based on DuPont's alleged failure to uphold its contractual obligation to provide him with a special retirement benefit under one of the ERISA benefit plans. Unfortunately for Trexel, however, the evidence is undisputed that he did not qualify for benefits under any of these programs.

Whether or not DuPont diligently pursued its investigation into whether Trexel qualified under the VTIP or ANWP is irrelevant if he did not qualify. Trexel does not contend that the decision that he did not qualify was arbitrary or capricious, the applicable standard for such a denial of benefits, but contends merely that it was not diligently pursued. If diligence in pursuit would have led nowhere, the assiduity of that pursuit is then irrelevant.

In order for the breach of contract claims to be cognizable under ERISA, plaintiff must show the elements of a contract: an offer, acceptance, and consideration. Restatement (Second) of Contracts §§ 17, 22, 71 (1981). As we stated previously in regard to Trexel's [*19] claim for a lump sum payment outside of an ERISA plan, Trexel testified that he understood his "offer" to be that MacIntyre would investigate to see if there was a program under which he would qualify, and, if there was, he would retire under that plan. At the same time, DuPont would try to transfer Trexel's job functions.

MacIntyre testified that his understanding of Trexel's proposal was basically the same. DuPont did not promise anything but was simply going to investigate Trexel's proposal. There is no evidence in the record that DuPont promised Trexel a special retirement incentive in exchange for eliminating his job. Even if Trexel's proposal could be considered an offer, in the absence of an acceptance or promise by DuPont to give Trexel such a benefit, DuPont cannot be contractually bound by that.

2. Constructive Discharge.

The doctrine of constructive discharge can apply to actions under ERISA for benefits. *Devine v. Xerox Corp.*, 625 F.Supp. 603, 608 (D.Del. 1985). The applicable standard in a claim for constructive discharge is whether "the employer knowingly permitted conditions of [employment] so intolerable that a reasonable person subject to them would resign." [*20] *Id.* (*quoting Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 888 (3d Cir. 1984)).

Plaintiff has not placed into the record any facts which even come close to establishing the necessary intolerable working conditions, or even a factual dispute as to these conditions. To the contrary, it is undisputed that Trexel was offered a responsible and desirable position as a lobbyist which would afford him the opportunity to remain with DuPont in the Legal Department at no reduction in salary. Trexel's counsel contends Trexel was very uncomfortable about taking on a new job at such a late stage in his career and that Trexel knew nothing about the lobbyist position. Accepting all of these facts as true, there is no hint of the intolerable conditions necessary to maintain an action for constructive discharge.

3. Discrimination.

Plaintiff's final complaint is a halfhearted claim for discrimination under ERISA, 29 U.S.C. § 1140. Section 1140 renders it unlawful for an employer to discriminate against an employee "for the purpose of interfering with the attainment of any right to which such participant may

become entitled under the plan." The purpose of this section is to "prevent unscrupulous [*21] employers from discharging or harassing their employees in order to prevent them from obtaining their statutory or plan-based rights." *Zipf v. American Telephone & Telegraph Co.*, 799 F.2d 889, 891 (3rd Cir. 1986).

Trexel's claim centers on DuPont's failure to properly investigate Trexel's possible qualification for an incentive plan as well as its failure to keep Trexel informed as to the planning for the 1985 ERO.

First, we reassert our previously stated conclusion that Trexel was not a "participant" in the 1985 ERO plan, as he retired before it was approved or effectuated. Therefore, Trexel has no standing to sue for discrimination under § 1140 with respect to this plan. *See Stanton*, 792 F.2d at 434, 435. Moreover, we have also ruled that the employer has no duty to reveal information about a new benefit plan while it is still in the planning stages. *See Id.* at 435. Consequently, Trexel would also be precluded on these grounds from maintaining a discrimination action based on DuPont's failure to keep Trexel informed of the planning for the 1985 ERO plan.

Furthermore, even if plaintiff were a participant and there was a duty to keep plaintiff properly informed, Trexel [*22] does not proffer sufficient facts to meet the legal standard for maintaining an action under § 1140. Both the legislative history and case law indicate that, in order to have discrimination under § 1140, there must be "harassment or adverse treatment of a particular employee which amounts to or threatens 'constructive discharge' and which is carried out for the purpose of

interfering with the employee's attainment of future benefits." *Phillips v. Amoco Oil Co.*, 614 F.Supp. 694, 721 (N.D. Ala. 1985) (*citing West v. Butler*, 621 F.2d 240 (6th Cir. 1980)).

Senator Hartke's comments, on behalf of his proposal that the Secretary of Labor be directed to establish administrative procedures for enforcing § 1140 reenforce the conclusion of the *Phillips* and *West* cases.

> Especially vulnerable are managers and executives whose substantial pension potentialities provide an incentive to their discharge before vesting. The managers of the bill ought to think twice too. Discipline and discrimination can be so unpleasant as to amount to a constructive discharge, a term used by the National Labor Relations Board. That can be the type of harassment which does not say that one is [*23] fired, but makes living such a hell that a person wishes he did not have to hang on and endure.

119 Cong. Rec. 30374, *reprinted in* Legislative History at 1774-75 (emphasis added).

Trexel has not alleged any conduct by DuPont which could amount to harassment or constructive discharge in order to keep Trexel from remaining at DuPont long enough to vest. The question of Trexel's vesting is not an issue here. In fact, it was at Trexel's specific request that the transfer of his job functions was accomplished at all. Then, when it became obvious that Trexel did not qualify for any retirement incentive, he was offered the lobbyist position. Such conduct cannot be considered discrimination in any respect.

Defendant's motion for summary judgment is granted.

ORDER

On this 4th day of September, 1987, for the reasons set forth in the Memorandum Opinion of this date,

IT IS ORDERED that DuPont's Motion for Summary Judgment is hereby granted.